

MESSAGE

OF THE

PRESIDENT OF THE UNITED STATES,

COMMUNICATING

A report of the Secretary of State, and the documents that accompanied it, in answer to a resolution of the Senate on the subject of guano.

JUNE 8, 1858.—Read, ordered to lie on the table, and ordered to be printed.

To the Senate of the United States :

I transmit, herewith, a report from the Secretary of State, together with the documents by which it is accompanied, as embracing all the information which it is practicable or expedient to communicate in reply to the resolution of the Senate of the 31st ultimo on the subject of guano.

JAMES BUCHANAN.

WASHINGTON, June 4, 1858.

DEPARTMENT OF STATE,
Washington, June 4, 1858.

The Secretary of State, to whom was referred the resolution of the Senate of the 31st ultimo, requesting the President "to inform the Senate, before the adjournment of Congress, if not incompatible with the public interest, whether the government of the United States has, in its correspondence with his excellency the Peruvian minister, recognized that a state of civil war existed in Peru during the late struggle between Vivanco and Castillo, and whether any and what measures have been taken to protect American interests in cargoes of guano purchased from Vivanco, or his officers, or agents, during his occupation of any of the guano islands within the territory of Peru;" and also "to communicate the correspondence which may have taken place between this government and the government or minister of Peru to the United States on this subject," has the honor to lay before the President the papers mentioned in the subjoined list.

Respectfully submitted,

LEWIS CASS.

The PRESIDENT.

List of documents.

1. Mr. Osma to Mr. Cass, (translation,) March 27, 1858.
2. Mr. Cass to Mr. Osma, May 22, 1858.
3. Mr. Black to Mr. Cass, May 15, 1858.

Mr. Osma to Mr. Cass.

[Translation.]

LEGATION OF PERU IN THE UNITED STATES,
Washington, March 27, 1858.

The undersigned, minister resident of Peru, in pursuance of instructions received from his government, has the honor of begging the Secretary of State of the United States to be pleased to direct his attention to the claims addressed to the Peruvian government by the minister of the United States at Lima, as they appear in the notes of the 4th and 9th of February ultimo, which he deemed it proper to transmit to his excellency the minister of foreign relations of Peru, and which are now within the reach of the Secretary of State.

The minister of foreign relations of Peru has minutely and satisfactorily answered all that was alleged in the notes referred to, accompanying such answer with the proofs and documents upon which the government of Peru relies to deny *in toto*, the justice, and even the plausibility of the claims to which reference is made.

The undersigned would deeply regret that the documents and declarations alluded to should not have been communicated to the cabinet of Washington; for through them only can an equitable settlement be made of the serious questions which have been started in that correspondence.

In instructing the undersigned to enter into direct communication with the government of the United States, the government of Peru was moved by the desire that no effort should be wanting on its part to satisfy the former of the sincerity and good faith with which the latter has in this case striven, as it will ever strive, to cultivate and deserve its friendship. It also had for its object to show in this form the deep reliance which it has ever placed in the moderation and the equity of the government of the United States, preferring to recur to them rather than continue, with its minister at Lima, a discussion, in the course of which the government of Peru regrets to have discovered in his proceeding a want of that impartiality and friendly disposition so necessary to maintain, in all cases, relations of good understanding between governments.

In his communication dated on the 4th of February last, the minister of the United States in Peru calls the attention of that government to the case of the American barque "*Dorcas C. Yeaton*," and of her captain, Samuel Potte, alleging the following in said case:

That, on the 23d of January, 1858, in latitude 22° 13', longitude 71° 31', on the high seas, at seven o'clock a. m., said barque was

detained by the Peruvian armed steamer *Tumbes*, with hostile demonstrations; that the barque having heaved to, Lieutenant Dueñas, the commander of the steamer, ordered her to be boarded, despatching for that purpose one of his boats under the order of an officer; that said officer boarded her, in fulfilment of his orders, and asked, in the language of authority, to be informed of the route which she was pursuing, as well as for the delivery of her papers; that Captain Potte obeyed under protest, and that the Peruvian officer went back to the steamer with the papers; that he soon returned, ordering the captain to accompany him on board of the "*Tumbes*;" that Captain Potte refused, and insisted that the flag and character of the vessel should be respected, but that, the officer repelling all excuse, the captain was compelled to obey, although protesting that he would make Commander Dueñas and his government responsible for the outrages which were committed against him; that on his reaching the steamer he again protested before her captain against the unlawfulness of such acts, but that his representations were disregarded; that the captain of the *Tumbes* eventually resolved that the barque should not continue her course, but, on the contrary, to send her under duress to Callao; that he abstained from taking forcible possession of her out of respect for the wife and family of the captain who were on board, but exacted his word of honor that he would immediately and directly proceed to Callao; that, accordingly, the *Dorcas C. Yeaton* proceeded for that port, with a prize officer on board detached from the *Tumbes* for that purpose.

The minister of the United States alleges that the barque, upon her arrival at Callao, was boarded by an officer of the captaincy of the port, who took possession of her papers, and ordered Captain Potte to accompany him ashore, treating him in an arbitrary, rude, and threatening manner; that the captain had no choice but that of obedience, and that he was then taken to the office of the port captain, and thence to the residence of the governor, where he was examined and asked whether he wanted a cargo of guano for the United States, in which case he was told that one would be given to him when he was set at liberty. The minister adds that the conduct of Commander Dueñas had been approved by the council of ministers of Peru, and sustained by the minister of foreign relations in an interview which he had with his excellency. Reassuming these facts, after alluding to them in detail, the envoy extraordinary and minister plenipotentiary of the United States concluded by denouncing them as a serious insult to the flag, the rights and the dignity of the United States, and, in consequence thereof, peremptorily demands—

First, that the government of Peru shall give such satisfaction as the government of the United States may prescribe.

Secondly. That Lieutenant Don Ygnacio Dueñas be suspended from his command, and continue out of the service of the republic for such time as the government of the United States may define; and,

Thirdly. That ample indemnification be made to the owners of the "*Dorcas C. Yeaton*" for all damages that may result from the facts mentioned.

Before reaching conclusions so serious as these, which might involve

still more serious consequences, and demanding a satisfaction which is, in terms, most offensive to Peru, because they imply nothing less than the annulment of her laws and tribunals, the minister of the United States in Lima, it was to be hoped, might have dwelt with some measure of soberness and attention in his investigation on the grounds of claims that are so serious, peremptory, and extraordinary. The government of Peru has certainly, up to this time, evinced no disposition the least to violate the rights or to insult the dignity of the United States; and, although such a disposition may be unjustly, gratuitously, and groundlessly imputed to her, the relative circumstances and forces of the two nations, no less than the fact that the interests of Peru depend on the continuance of her pacific relations with all nations, and especially with the people of the United States, would seem to tell sufficiently upon any dispassionate mind to render impossible the very idea that the government of Peru should attempt or pretend to dishonor the flag of that republic. No doubt it is quite possible that, in Peru, as in any other country, an officer in her service may commit, through want of reflection or due prudence, some act which would require satisfaction; but it seems impossible that his government, proceeding in a dispassionate manner, and with a knowledge of the facts, should, without reason, assume upon itself the very serious responsibility of adopting and approving such a conduct. The very fact of the government's publicly approving the conduct of Commander Dueñas, it seems to the undersigned, ought to have started some doubt in the mind of the enlightened minister of the United States at Lima as to the accuracy of the facts on which he has insisted with so much energy.

The experience which his excellency, through a long residence in Peru, has gathered as to the character of its government, the deep and habitual respect with which it has ever received and entertained his communications, the personal consideration which it has ever lavished upon him, and the important concessions which have constantly been made to him, only out of respect for him and for the nation which he represents; all these, it seems, ought to have checked the severe and hasty judgment which he has been pleased to pass upon this matter. At the time of writing his communication his excellency had under his eyes Commander Dueñas' official report, published on the 30th of January, in the "Peruvian," the government's official paper, which positively states that the change in the vessel's course was made in consequence of an "agreement" with the captain; and whilst his excellency is pleased to assume, as truthful, one sentence of the report which will be hereafter alluded to, and which he considers accusatory of the commander of the *Tumbes* and of his government, he chooses to argue of falsehood the rest of the document which testifies the good faith and legality of the conduct of that officer.

In order to set up and sustain the serious claims referred to, the minister of the United States relies exclusively on the protest made for the purpose on the 23d of January, 1858, by Captain Potte, his pilot, and two of his sailors. The minister of foreign relations of Peru, in his note of the 9th of February, communicated to the minister of the United States in Lima the minutes of the declarations of

Captain Potte, the pilot, John P. Cogswell, and the second pilot, Joseph P. Cunningham; as also those of the commander of the "Tumbes," of the officer who boarded the "Dorcas C. Yeaton," of the five sailors who were in the boat with him, together with that of the marine who was transferred to Callao in the barque; all taken before the judge of the first instance at this port, sworn to and subscribed by all of them, and all evidencing the complete falsity of the allegations of the protest, as the honorable Secretary of State will perceive from the copy which the undersigned has the honor of transmitting to him. From these declarations honorable Mr. Cass will see that the true relation of the facts is the following:

Commander Dueñas having been ordered to pursue and capture those vessels which, according to the information of the government, had gone to "Punta de Lobos" and "Pabellon de Pica," in collusion with the insurrectionists of the south of the republic, for the criminal purpose of working the deposits of national guano at those points, met on his voyage the "Dorcas C. Yeaton," which was sailing in that direction. He made the usual signal to her to heave to, and sent an officer to her, unarmed and accompanied by five men in a boat, the men also being unarmed, in order to ascertain whence she came and whither she was sailing. The sailors remained in the boat, and the captain went on board, in the most peaceful manner; the captain receiving him courteously on the deck of the barque. Being asked whence he had come, and to what point he was going, the captain answered that he was on his way to Iquique, and voluntarily exhibited his papers, and as readily delivered them also to the officer, who returned to the steamer. The papers showing a discrepancy, namely, that the barque had been cleared for Callao by the way of Valparaiso, whence it had proceeded, whilst the consul of the United States at that port had cleared her for Iquique, the officer returned to inquire into the cause of this irregularity, and the captain of the barque, wishing to give a satisfactory explanation, proceeded of his own accord and will aboard of the "Tumbes," where he entered in a free and voluntary communication with its commander. Mr. Dueñas being convinced, by Captain Potte's representations, that he had no other object in going to Iquique than that of securing freight to return home, he promised him, if he would return to Callao, he would be liberally paid for his delay, and that he would procure him a cargo of guano from the Chincha Islands, with a most profitable freight. Commander Dueñas' object in making this proposition was assuredly to turn the barque aside from a criminal undertaking, which might have involved its owners in fatal consequences and complicated the relations of both nations. It went also to deprive the insurrectionary forces of the advantages which they might derive from the plundering of the guano deposits, by selling one more cargo of that article. Captain Potte could not but find the offer a most advantageous one, and he not only accepted it, but also asked Commander Dueñas for a formal communication for the general commandant of marine at Callao, in order that the arrangement might be carried out without any delay; requesting, at the same time, that he might be accompanied by an officer of the "Tumbes," in the character of a passenger, to

bear this communication. To this Mr. Dueñas assented, and Captain Potte cheerfully proceeded to Callao, where the agreement was carried out, and he was given, on the part of the government's consignees, a contract of freight to carry guano to the States, at the rate of twenty dollars per ton, and, besides this, the large sum of nine thousand six hundred dollars for all expenses of demurrage and such damages as might accrue to him, in any manner, from the change of her voyage under the circumstances. It is remarkable that this statement is backed not only by the declarations above cited, but that also on the 1st of February, *three days before the communication of the minister of the United States in Lima*, Captain Potte made affidavit of the same and signed it before the consul of the United States, who certified to it, as appears from the copy on file in this legation, embracing also the terms and conditions of the agreement. The undersigned has the honor of tendering to the Secretary of State all the official documents relative to the business, by which the accuracy of the facts which he has just related will originally and incontestibly appear.

The undersigned has merely to advert to the commentary which the minister of the United States, in Lima, makes on the expression used by Commander Dueñas in his official communication or statement when he says: "*I made Captain Potte come on board.*" This phrase seems scarcely to be considered worthy of a serious official communication or of special mention; and the undersigned inclines to the belief that the minister has not, in this instance, appreciated with his usual accuracy the true value of words—a very natural thing when a foreign language is in question, however well known that language may be. The phrase to "make come" does not necessarily imply the use of force or coercion. A friendly invitation or a mere suggestion can "make come" just as well as a threat or an act of violence. That Mr. Dueñas used the phrase in a plain and not offensive sense is proved, not only by his own declaration, but by that also sworn to by Captain Potte, who, referring to the interview on board of the "Tumbes," and to the other facts, says that "in all those acts there was, on his part, the most ample liberty, without his suffering any intimidation." If any greater confirmation of this solemn declaration could be required it might be found in the document cited above, which was subscribed before the consul of the United States on the 1st of February, in which Captain Potte also asserts "that he has no complaint to make nor blame to cast against the said commander of the Tumbes or his government."

In view of such facts, so authentically and solemnly put together, not only by the Peruvian officers who participated therein, but by the very witnesses, themselves interested, who drew up the protest upon which the plenipotentiary of the United States has grounded his claim, it seems to the undersigned unnecessary to go into a discussion of the questions of law which have been broached in the correspondence between his excellency and the minister of foreign relations of Peru. The facts assumed having no existence, there is no ground for an accusation, nor can there be any reason for defence or vindication. And here the undersigned must declare his inability to understand the intentions of the said plenipotentiary of the United States in

stating, in his communication of the 10th of February to the minister of foreign relations of Peru, after having received the documents mentioned, that he sees "no good reason to change or modify his demand for satisfaction for the offence committed against the flag of the United States by the commander of the "Tumbes." The declarations of the captain of the "Dorcas C. Yeaton" and of his mates have to be either false or true; if the former, the cause of the complaint which, according to his excellency, exists, cannot be conceived, since they positively deny the fact of violence, of arbitrariness and coercion, which was the exclusive ground for the supposed offence; if the latter, being given under oath, it is equally hard to suppose that the United States minister in Lima, or the enlightened government which he represents, can hold up such persons to the world as worthy vouchers for a serious accusation against a friendly nation whose officers—men of honor and of character—indignantly deny it under the solemn responsibility of an oath, whilst their government itself formally disclaims the offensive intention implied from the presumed facts. If Captain Potte and his mates are capable of making a false declaration they must be equally so of making an unfounded protest. The one cannot be ascribed to them without ascribing the other also.

The undersigned does not pretend to solve so difficult a question, because it is not his duty to do so. It is enough that, with all due respect, he should cast back a gratuitous accusation, without taking upon himself the defence of the witnesses who have been called to support the charge. On the contrary, he would most sincerely wish that he could find some reason for impugning the assertion under oath, made by Captain Potte and his mates, that he had made his protest *in consequence of the instigations of the consul of the United States, and of orders, as he understands, of the minister resident of this capital.* If there be no mistake, as the undersigned hopes there may, in this and the subsequent statement, made by Captain Potte, to the effect that in the room of the chief clerk and in his presence said minister had reproved him for accepting the contract for freight, already referred to, "adding that he acted under bad advice;" then would be revealed, in a broader light, on the part of the minister plenipotentiary of the United States in Peru, a spirit no way subservient to the impartial examination of questions of so delicate a nature, and one, it may be, incompatible with the due exercise of his high functions at the seat of government of Peru.

Before passing over to the other question, to which the undersigned would desire to call the attention of the very honorable Secretary of State, he cannot but advert to the remarkable observation made by the minister of the United States in Lima, in his communication of the 4th of February, in which he lays down the *gravamen*, as it were, of the offence attributed to Commander Dueñas, in attempting to visit a vessel of the United States on the high seas, "in a time of profound peace." It is hard to realize the words quoted in view of the facts laid down by the minister himself in his communication of the 9th of February, in which, in order to sustain the legality of the traffic in which the vessels captured at Punta de Lobos and Pabellon were engaged, his excellency declares that Vivanco's rebellious party, under

whose protection the vessels referred to pretended they were acting, was "in a state of civil war" with the lawful government, and therefore invested with the rights of a belligerent nation. If the revolutionary party be a belligerent one, even so must be the government against which it is waging war; and, consequently, the minister himself, by his own argument, declares that "Peru is in a state of civil war." And therefore, according to the doctrine of his excellency, Peru exhibits the spectacle, somewhat anomalous indeed, of being at one and the same time at peace and at war. It is at peace when its belligerent rights are to be denied; it is at war when it is sought to refuse it the right of a nation at peace and invest the plunderers of its property with the respectable character of neutrals engaged in lawful trade by the laws of war!

The Secretary of State, with his great experience in questions of this nature, will not fail to perceive that the true principle of the law of nations, which applies to the present case, is equally removed from the two extremes, where it is placed by the minister of the United States in Lima. Without being in a civil war, recognized as such in the interior, or by the exterior of the republic, Peru regrets the existence, in a portion of her territory, of a rebellion against the lawful government, supported by the mass of the nation, and recognized by other governments. Speculation and plunder being the exclusive ends of that rebellion, the rebels have directed their forces almost exclusively against the deposits of national guano; and, by means of a war steamer, which the president of the republic has declared to be a pirate, they have been, from time to time, successful in defrauding the public treasury of large sums of money from the sale of guano at any price, inviting the adventurers of other nations to go and load their vessels with that article. The illegality of this traffic requires no demonstration; and the government of the United States, which would be the last to tolerate such in its own case, would also not fail to stamp with serious reprobation any participation in it by its citizens. As little does the undersigned doubt that this government would consider itself fully bound to prevent, in its own case, a spoliation of its property by the citizens of other nations, conniving with its own in a state of insurrection, and to adopt measures for visiting suspicious vessels at those places where they might reasonably deem it proper to exercise a lawful supervision. The government of Peru and the undersigned by no means deem it necessary, in this case, to discuss or put forward the right of visitation. Honorable Mr. Cass has verbally stated to the undersigned that there are cases in which a national vessel might be justified in visiting a merchant vessel on the high seas, and that the government of the United States would not, in such cases, make a formal reclamation; and the honorable Secretary of State had the kindness to put a case entirely applicable to the case and the circumstances of the "Tumbes" when she signalled the "Dorcas C. Yeaton" to heave to. This is enough to absolve the undersigned from the necessity of insisting here on the right which all nations have to protect themselves, under certain circumstances, independently of the strict question of belligerent and neutral principles.

The port of Iquique, to which Captain Potte was shaping his course,

is one of the ports of the Peruvian territory frequented by the piratical steamer already mentioned. The principal cargo to be derived from its neighborhood must be one of national guano. The discrepancy between the clearances, one being for Callao and the other for Iquique, clearly confirmed the suspicion, raised by the direction which the vessel was pursuing and the locality where it was met. The courtesy with which, this notwithstanding, she was treated—the total absence of extortion or violence, and the marked advantages which it derived from the interruption of the voyage—everything, should go to satisfy the Secretary of State, as the undersigned trusts, of the respect and consideration which the government of Peru and its officers strive to pay to the flag of the United States and to the rights of its citizens.

With these observations, the undersigned passes on to the consideration of the despatch of the United States minister at Lima, dated February 9, through which his excellency claims against the government of Peru all the damages and injuries which may ensue from the capture of the American vessels "Georgiana" and "Lizzie Thompson" by said war steamer "Tumbes," and from their subsequent detention by the Peruvian government. His excellency also calls for the responsibility of the government of Peru in the premises.

The facts in which the above mentioned claim is founded admit less controversy than those of the case discussed in the first instance. The "Georgiana" was captured at "Punta de Lobos," on the 24th of January, 1858, and the "Lizzie Thompson," on the same day, at "Pabellon de Pica." Both had on board part of their cargo of guano from those deposits; the confessed object of their presence at the points referred to being to take in guano for exportation to foreign ports. They were taken under capture to Callao, where their captains, H. A. Wilson and Stephen Reynolds, with the mate of the "Georgiana," L. A. Hamilton, after three days' imprisonment, were released, under security, as they were charged with a violation of the criminal laws of the republic. The minister of the United States in Lima deems it proper to maintain, in his aforementioned communication, three propositions in relation to those facts:

First. That neither the vessels nor their captains had participated in any criminal or scandalous contraband;

Secondly. That the arrest of the vessels and of their officers was not in virtue of a perfect right;

Thirdly. That the manner of the arrest and of taking them to Callao was irregular, cruel, and illegal.

The undersigned intends to give to each of these propositions its relative consideration, without, however, entering upon the discussion of some points, set forth in connexion with them, by the honorable minister of the United States, a connexion which, in the humble opinion of the undersigned, as touching the legitimate object of the controversy, is not quite as apparent as might be desired.

It is needless to repeat that "Punta de Lobos" and "Pabellon de Pica" are two points where deposits of natural guano are found, public property of the republic of Peru. In the "report on the commercial relations of the United States with foreign nations," transmitted

on the 4th of March, 1856, to the House of Representatives, by the worthy predecessor of the honorable Secretary of State, and printed and distributed by order of Congress, is to be found, at page 700 of the first volume, an exact description of those deposits, their locality, and their extent. Article 15 of the Commercial Regulations, promulgated by the government of Peru in 1852, declares that "the vessels that take in guano for foreign ports shall be allowed to do so in the Chincha Islands only." Article 114 of said regulations provides that "the exportation of guano shall be carried on only by vessels under contract with the government or its agent," and article 113 states "that vessels that may be found at anchor on the coasts of the islands belonging to the republic shall be confiscated, and moreover, that, if guano will have been found aboard, the captains and crews be handed over to the action of customary justice to be tried as delinquents in cases of theft." The existence of this regulation must be, and it could not but have been, known and understood in the Union; for in the same "report," officially presented, we find at page 685, and on the ones following, of the first volume, a detailed reference to its provisions, with the special information touching the guano question.

Besides what has been cited, we find in their full vigor, and as they still are with some charges therein mentioned, the decrees of the government of Peru in relation to the contraband of guano, dated January 14, March 21, and May 10, 1842, lately reprinted for abundant caution in the official paper of the 27th of February, 1857. They declare "that no quantity of guano shall be taken out, for exportation to foreign ports, from any portion of the territory of the republic, unless from the northern island of the Chincha group;" that no authority of the republic can, in any case, grant permits to take out guano for foreign exportation, and that the custom-houses, with the exception of that at Callao, shall refuse all clearances applied for; that every national or foreign vessel that may anchor at or come to the islands or places where guano may be found, without due permits from the authorities that are empowered to grant them, shall be liable to confiscation;" and that vessels that may be engaged in contraband, or may violate the articles in relation to anchoring at or coming to the guano islands or deposits, or those relative to the taking out of guano from other points except those designated, and that designation being confined to the northern of the Chincha Islands, shall be seized, and their captains shall be brought to trial as contrabandists."

Lastly, the national convention of the republic deemed it proper to promulgate its decree of the 1st of April, 1857, which was published in the official paper of the 2d of said month. It laid down the following provision:

"That all the guano exported, and thereafter to be exported from the Chincha Islands, or from any other deposit of Peru, by disturbers of the public order, or by virtue of contracts made with them, or with their agents, shall at all times be subject to be claimed back as stolen national property, and the parties responsible therefor shall be civilly and criminally prosecuted in conformity with law."

Such being the provisions of the existing laws of Peru, laws in vigor at the time when the "Georgiana" and the "Lizzie Thompson" were captured, laws promulgated, the most part of them, many years back, and the most recent of them nearly ten months before the arrest was made; the government of the Union itself having nearly two years before officially recognized and indicated the most important of them; and it being equally notorious and public in the Union, from the discussion between the two governments in relation to the "Chincha Islands," that the guano deposits in Peru are the exclusive property of the nation, the products of which are exclusively worked out and sold by the agents of the republic under contracts; the undersigned will take for granted that there is, binding upon the captains and crews of the vessels referred to, an obligation to conform their action to those laws, or to incur the penalties which they provide. It being also granted and acknowledged, that those vessels were met at points interdicted, not only without permits from the lawful authorities of the republic, but in the act also of doing that which, under the laws, no authority of the government, however legal it may be, can lawfully allow; that considerable quantities of guano, the property of the nation, had been found on board of those vessels; that the captains themselves had accepted and signed contracts for freight, to take the guano from those points, in violation of the laws quoted, and in contempt of their authority, of respect for, and of the rights of the republic; it is no easy matter to understand that system of reasoning which results in declaring them absolved from all criminal responsibility.

Setting aside the observations, no doubt very interesting and worthy of the acknowledged distinction of the honorable representative of the United States in Lima, touching the rights of nations under republican institutions, the arguments by which he maintains his first and second propositions are reduced to two:

First, that the captains of the vessels arrested having gone to Iquique in the pursuit of lawful commerce, and being there met with by official agents of an apparently lawful character, they were bound to obey them and to act to the extent allowed by the permission of those *de facto* authorities; and that they had such permission to go and take guano in the ports mentioned, and that if the permits were illegal the blame must not attach to them but to the pretended authorities.

Secondly, that Peru was, and it had for nearly two years been, in a state of civil war; that the existence of the revolution was well known; that, according to the modern doctrine of the rights of nations, the two contending parties occupy, toward each other and toward the other nations, a belligerent position, which position imparts to individuals of the friendly nations the rights of neutrality as in a case of perfect public war.

The same discrepancy, previously noticed between the "profound peace" of Hon. Mr. Clay's communication of the 4th of February and the state of "civil war," commented in this note, seems to the undersigned to lie at the ground of the two arguments which he has just reproduced. If the vessels in question went as neutrals to Iquique, prosecuting their commerce in a port of a nation at war, it seems difficult to ascribe to their captains the innocent and natural error,

under the influence of which, it is supposed, they in good faith mistook the pretended authorities of the insurrectionists for the lawful authorities of the government of Peru. If, on the other side, they entered Iquique as a port of a nation at peace, intending to obey the laws and conform to existing regulations of commerce, how can they now be defended under the supposition that they claimed the rights of neutrals trading with a nation at war? But, passing by this inconsistency, or what seems to be one at least, it strikes the undersigned that there is a conflict in the Hon. Mr. Clay's arguments, and that in a very important point, with the most sacred principles of public law.

The principle that in certain cases a civil war may confer the rights of belligerents on the two contending parties, and communicate the rights of neutrals to those who trade with them, respectively, has no doubt been admitted as a sound principle. But this principle, which is exceptional in its origin and legitimacy, has never been carried, as the undersigned with some confidence presumes, so far as to assert that in the unfortunate event of a civil war in any nation the members of other friendly nations have the right of determining, by themselves and for themselves, the existence of such a war, without the previous action and authority of their respective governments. The undersigned, on the contrary, thinks that he can rely on the distinguished support of the honorable Secretary of State, when he advances it as a sound and settled doctrine in such cases, that the government of the United States has first to officially recognize the state of civil war in Peru, and declare their neutrality therein, before their citizens can avail themselves in Peruvian territory of the rights of neutrals in a belligerent country. Unless the undersigned mistakes, this doctrine has received the illustrious sanction of the Supreme Court of the Union in various cases, and as decidedly so, that of the courts of Great Britain. If it were not so, if the principle laid down by Mr. Clay could make good that the bare fact of the chiefs of an insurrection having enough of power temporarily to command and hold possession of the property of the nation in its territory, authorizes the members of other nations to deal at once with them as the owners of what they thus hold, there could be no security anywhere and the door would be thrown wide open to every kind of disorder and plunder. The United States, luckily powerful and happy so far, have not gone through the sad ordeal of any domestic revolution, but in the possible contingency of so disastrous an event, it might be equally daring and dangerous for the members of any foreign nation to proceed, without the previous determination of their own government in the matter, to treat with the rebels, to help them in their spoiliations of national property, and afterwards claim, for their defence or justification, the rights of neutrals during the existence of war. The undersigned will not say, though such an assertion might not be a very rash one, that the United States would exact a satisfaction or a compensation from that nation whose subjects might thus expose themselves; but they would certainly not allow any national intervention, however powerful it might be, to interfere with the vindication of their outraged laws. The government of Peru confidently relies upon the conviction that the cabinet of Washington

could not wish to impose upon the other nations, much less upon those of inferior power, principles which it would not recognize in its own case.

If the undersigned have not erred in these inferences, there is little to be added relative to the two first propositions of the minister of the United States in Lima. It is clear that the captains referred to cannot shield themselves behind the pretence of war or of neutrality.

The revolutionary state in the southern portion of the republic of Peru, being as public and notorious as it is alleged to have been by the honorable Mr. Clay—a state of confusion, which, according to his own communication had been enduring for nearly two years; a state publicly announced and freely commented upon, from its commencement, by the whole press of the Union—how can it be possible, in a question of fact, to impute to two American captains, intelligent as all men of their class are, the gross and absolute ignorance under which they are, by his excellency, presumed to have labored as to so anomalous and so well known a state of things? Can it be believed that, after having been in Iquique for the length of time which they spent there, they failed to learn that the port was in possession of the insurrectionists? Is it because they were not under an obligation, moral and legal, to inform themselves of so important a point? Granting, for the sake of argument, that they were uninformed of the revolutionary condition of the port and of its usurpation by the pretended authorities when they entered Iquique, is it credible that they were ignorant of the fact when they sailed out of it? And aware of it, as it was their duty to be and as they no doubt were, being under an equal obligation of ascertaining the laws of the country and paying obedience to them, if, lured by a spirit of speculation or of covetousness, or if it be by a mere spirit of adventure, they resolved to violate the regulations of the republic, to affiliate with the treasonable disturbers of its peace and to plunder its patrimony, must they not also be held to have taken upon themselves the responsibility and the consequences of their course? It would certainly be strange, were they absolved from these for the reason that one of them had made a contract on guilty grounds with the French consul, and that both had, in the port of Iquique, seen an English man-of-war, as the honorable Mr. Clay so singularly insists upon. There is nothing improbable in the fact that even a consul of any nation should fail in respect of the laws of the country in which he exercises his functions, because, both within the experience of the Union and of Peru, such cases have been known to occur. It is therefore no way strange that an armed vessel should remain in a rebellious port, not to countenance its rebellion, but, on the contrary, to protect the citizens of its flag against revolutionary violence and guilt. The undersigned cannot understand how the captains alluded to can claim the benefit of the good faith and ignorance invoked in their behalf by the honorable minister of the United States in Lima, confronted by the facts set forth by the charter parties themselves, under which they were acting when captured. It is a remarkable circumstance that while the pretended permits, granted by the pseudo commander of the navy, Don Felipe Rivas, under which the captains would now take refuge,

merely authorize them "to proceed *south*, to take in guano," neither of the charter parties makes mention of any point south; but, on the contrary, the contract with the Lizzie Thompson grants the privilege to the charterer of naming any of the ports of Peru, provided, that it be not one more to the north of Callao, and therefore embracing the Chincha Islands. Again, the contract for the Georgiana gives to the freighters a free choice of any of the ports on the whole coast of Peru, north as well as south. An irresistible consequence from these facts is that neither the charterers nor the chartered vessels had any intention of confining themselves to the southern ports, where alone there was the least shadow of an authority *de facto*, standing in opposition to the government of the nation, whilst it was evident that the captains had lent themselves to the schemes of the insurrectionists and had joined in accompliceship with them to defraud the treasury of the republic, ready as they were to carry out their project, wherever the most inviting and least dangerous opportunity might offer.

Insomuch as the possession, *de facto*, by the insurrectionists and their pretended authorities, is concerned, it must be said that from the first outbreak of the revolution organized by Vivanco up to the present hour, this leader has had under his command, or in his favor, no portion of the territory of the republic, with the exception of the city of Arequipa; for while the actual presence of his armed forces continued, and at the time when the arrest of the vessels took place, Vivanco was besieged by the national forces in Arequipa, and confined to that point, without more authority, of any real character, than that which he exercised within its very narrow limits. It is true that the sometime national frigate, the "Apurimac," whose officers at the outset declared in favor of Vivanco, not having returned, with the other vessels that had also mutinied in the commencement, to its allegiance to the government—although its decree had immediately declared her to be a pirate—went cruising about the coast with the pretended naval commander on board, bombarding the towns, depredating, stealing, and selling the guano belonging to the nation, granting fraudulent permits for its excavation and shipping, and protecting the vessels then loading in its robbery. This is the exact history of the facts, and no one knows it better than the Hon. Mr. Clay; the history of the ostensible authority, and of the *de facto* possession, on which his excellency now relies to protect the captains in the premises. The only occupation of this piratical frigate, and of its floating and itinerant authorities, which it conveys from point to point, is notoriously that of robbing and of authorizing and protecting robbery. When they were in Iquique, they there put forth their phantom of a government, and there exercised a temporary jurisdiction of pirates over "Punta de Lobos," "Pabellon de Pica," and other adjacent points. And it is noteworthy that long before the events under examination all communication had ceased, indeed all relation between Vivanco, Iquique, and Apurimac, its officers, and the authorities, which it conveys about, or those that are countenanced by their presence, being the only shadow of a *de facto* government that existed in those parts. Moreover, it is highly important to remark that neither Vivanco nor his government has, through any public decree, or act of any kind,

pretended to repeal the decrees and regulations adduced, all prohibiting the exportation to foreign parts of guano taken from the herein-before mentioned deposits; so that, besides the fact that neither he nor his intrusive authorities are recognized by the Peruvian nation or by the government of the Union, the pretended license signed by Rivas commands neither the authority nor the sanction of the so-called revolutionary government, forasmuch as it may consider itself established *de facto*. Indeed, it is strange that the Hon. Mr. Clay should maintain with so much energy the idea that there existed at "Punta de Lobos" and "Pabellon de Pica" an established *de facto* government holding those points, when a national vessel of so little tonnage as the "Tumbes" could, without resistance, take possession of the vessels that were found there and thus assert and maintain the jurisdiction of the lawful government, and if, as supposed by the minister, the possession *de facto* be the only criterion of jurisdiction for putting to effect the fiscal and custom-house laws, through means of a seizure, how, then, could a possession thus affirmed and realized *de facto* through the capture, by the "Tumbes," of the vessels in question, fail to be considered, in point of law, as a just and lawful ground for the seizure that was made? Surely it will not be maintained that the fact of holding the *de jure* jurisdiction lessened the effect of the possession *de facto* of the "Tumbes," nor yet that the presence of a few insurrectionary soldiers on shore, or at the points mentioned, could deprive the lawful government of the right of exercising in the port that lawful jurisdiction of which it was deprived on shore, merely through the violence of an illegal power. When we speak of a *de facto* authority, we are bound to show that it actually exists. Whenever, at any point, it lacks force to sustain itself, from that moment its existence ceases there.

In view of what precedes, and of the powerful reasons adduced by his excellency the minister of foreign affairs of Peru, in his correspondence on the subject with the minister of the United States, the undersigned flatters himself that proof is made out of the perfect right under which his government acted in the controverted cases, and of its entire adherence to international laws, to the treaties of 1851 between the two nations, and to the respect which is due to the dignity of the United States and the rights of their citizens.

All that is now required is the refutation of the honorable Mr. Clay's third proposition, in which, speaking of the right exercised by the Peruvian government in the arrest of the vessels and crews referred to, as a perfect right, his excellency denounces its mode of execution as illegal, cruel, if not barbarous. The language used by his excellency would be harsh, very harsh, even if they were justifiable.

His excellency at the outset starts with a great error when he attempts to define the arrest of the vessels and crews in question as a simple seizure under ordinary custom-house laws. His excellency forgets the state of insurrection and violence on which he lays so much stress in the sequence of his arguments. He entirely puts out of view the fact that participation with the rebels in taking guano from the deposits in question has been formally declared to be robbery. In his excellency's view a mere blank is the guilty complicity of the

parties with the pirates of the "Apurimac," in plundering the public treasury and thus supplying rebellion with more effective means of shedding blood and resisting the lawful authorities of the country. Engaged as they were in such undertakings, they certainly had no right to expect either favor or consideration. To rob the nation forcibly of its property, or under the protection of lawless violence, cannot be less than a very serious crime in itself, because it is, at the same time, a violation of the revenue laws. On the contrary, if there be any distinction at all, on that account it lies in the circumstance that the greater crime absorbs the less, and imparts its own character to the act.

His excellency likewise forgets that, as he himself has alleged, the points where the arrests were made were garrisoned by some forces of the insurrectionists, and that the piratical frigate "Apurimac," with forces superior to those of the "Tumbes," was not far distant, its principal occupation being that of visiting and protecting those points. Under such circumstances, there was neither time nor room for considerations and condescensions in regard of persons engaged in criminal acts, the breaking up of which was the object of the visit made by the "Tumbes." Nor was there time for delays; and if, in the manner in which the vessels were taken and sent to Callao, there was something of haste or violence, surely the blame must fall back on the wrong-doers who, by their conduct, created a necessity for forceful measures. The undersigned omits comments on the observations of the minister of the United States on the injustice, illegality, and cruelty which would have attended the destruction of the vessels and abandonment of their crews, as it is said the commander of the "Tumbes" threatened his intention to do. The vessels were not destroyed, and the fact is sufficient to preclude resort to possibilities. If a portion of the crews was left at the points where they were found with the vessels, the fact grew out of the sheer necessities of the case. The commander of the "Tumbes" found five vessels of great burden. He could not leave their crews aboard, because, together with the laborers that were collected with them, they might have proved too numerous for the safety of the prizes. For the same reason he could not take them on board of the "Tumbes." There was, therefore, no other resort than that of leaving them in the smaller boats, all sufficient to take them whithersoever they might choose to go; and, as a proof of that sufficiency, four days afterwards, and in their boats, they reached Arica, where they were assisted by the prefect with an allowance of fifty cents a day, made to each individual, and whence they were forwarded to Callao, in which port, receiving a like allowance, they remained waiting the result of the trial which had been instituted. At the points where they were originally left, they had the resources common to the insurrectionary forces there stationed—sufficient, at all events, to repel the accusation of cruelty, which has been brought forward against their abandonment. The captains went to Callao, under parole, in their own vessels, and were sent to jail on their arrival. All the usual forms of law were adhered to in their case, in conformity with the enactments and usages of the land, with this favorable exception, however, that they were released under bond,

after three day's attention—an act of courtesy and consideration on the part of the government, at the request of the minister of the United States, without, therefore, renouncing the perfect right, upon which it had stood from the beginning, in all the proceedings relative to the case. The undersigned flatters himself that this manifestation of the cordial good will which animates his government will not be the less appreciated in view of the singular and, to this hour, unexplained conduct (difficult to be explained) of Mr. Miles, the United States consul in Callao, who had the boldness, as appears from a communication of the collector at Callao, to introduce himself, without previous permission, into the place where the captain and the mate of the Georgiana were officially to take their declarations, thus exercising a jurisdiction which, he could not but be aware, belonged exclusively to the courts of the republic. The undersigned will probably find himself under the obligation of formally bringing this serious proceeding of the consul to the Hon. Mr. Cass' consideration.

Meanwhile, regretting the inevitable length of this note, he will no further delay its conclusion.

The undersigned ardently desires to have it in his power, as soon as possible, to communicate to his government the recognition, by the cabinet of Washington, of the perfect right under which it acted in the questions in controversy, and he takes pleasure in reiterating to the honorable Secretary of State the assurance of the sincere wish of his government to cultivate and draw still more closely the good relations of friendship with the government of the United States; and he hopes that nothing that has occurred in the cases to which he has referred, shall, from the exaggeration or the inaccuracy of the statement of facts, contribute to lessen, in the slightest degree, the sentiments of friendly feeling on the part of this republic for that of Peru.

The undersigned has the honor of tendering to the honorable Secretary of State the assurance of his high respect and distinguished consideration.

JUAN Y. DE OSMÁ.

The very Honorable LEWIS CASS,
Secretary of State of the United States.

Mr. Cass to Mr. Osma.

DEPARTMENT OF STATE,
Washington, May 22, 1858.

SIR: I have received your note of March 27, and have submitted it to the President for his consideration, and I am charged by him to make known to you his views of the subject you have presented.

While the confidence you have been instructed by your government to express in the moderation and equity of the government of the United States has been highly gratifying to the President, he regrets that it has been accompanied by an expression of dissatisfaction with

Mr. Clay, the minister of the United States at Lima, for the manner in which he discharged his duties under the unpleasant circumstances in which he was placed by the necessity of urging on the government of Peru just reparation for injuries committed against the persons and property of his countrymen. If Mr. Clay has rendered himself justly obnoxious to the charge of a want of impartiality and of friendly disposition in his proceedings, he has failed to represent the sentiments of his government, and has adopted a course which it does not approve. The United States cherish the most friendly feelings towards the Peruvian people and their government, and take much interest in the advancement of their beautiful country in all the elements of improvement.

I have carefully examined the correspondence between Mr. Clay and the Secretary of State of Peru, and appreciate his position and the zeal and ability he displayed, without, however, adopting all his conclusions. His interposition became necessary in vindication of the rights of his country, which, in his opinion, had been violated, and in that opinion his government concurs with him. The evidence which has been collected is in some particulars contradictory, but it shows very clearly that serious violations of the rights of the United States had taken place, and I do not perceive that the views taken by Mr. Clay can properly subject him to the complaint of partiality or of ill feeling.

I am confident he knew too well what was due to his own position and to the sentiments of this government to offer any intentional offence to the friendly government of Peru. I perceive, on reviewing the correspondence, that there are some indications of excited feeling on both sides, and some expressions indulged that had better been avoided. But I content myself with this reference, without a desire to pass any further judgment upon it.

I beg leave also to assure you that any representations you may be instructed to make against Mr. Miles, the American consul at Callao, will be received without hesitation, and the facts investigated with a view to mark his conduct with the disapprobation of the government, should it be found that he has failed in proper respect to the government of Peru, or discharged his duties in an improper manner.

There are three subjects of complaint presented by Mr. Clay to the government of Peru. These are, the boarding and detention of the American vessel the *Dorcas C. Yeaton* by the Peruvian armed steamer the *Tumbes*, and the capture of two other American vessels, the *Georgia* and the *Lizzie Thompson*, by the same national cruiser.

The course pursued by your government in offering an adequate compensation for the interruption of the voyage of the *Dorcas C. Yeaton*, and its acceptance by the captain in satisfaction of the injury, has withdrawn the question of damages on account of that occurrence from the existing controversy; but the boarding of the *Dorcas C. Yeaton* by the Peruvian vessel-of-war presents very grave considerations for the interposition of this government. The American vessel was sailing upon the high seas, under the flag of her country, when she was approached by the Peruvian vessel-of-war, which, to adopt the expression used by you, "made the usual signal for her to heave

to," or, in other words, fired a gun to indicate to the unarmed ship that she must stop and await the pleasure of the armed one.

Before proceeding to examine the facts, it is necessary to lay down the principle of immunity which protects the vessels of every independent power upon the ocean from search or seizure by another power. In a recent correspondence with Lord Napier, the minister of her Britannic Majesty to the United States, I had occasion to investigate this subject, and to make known the views of the United States in relation to it, and their determination not to submit to the detention and search of their vessels in time of peace under any pretext whatever. I take the liberty of enclosing, for your information, a copy of the public documents containing that letter, and inviting your attention to the marked paragraphs, (pages 47, 48, and 49,) explanatory of the position assumed by this government, and which is applicable to the vessels of the United States in every sea where they may penetrate.

You will perceive that the only exception to the entire immunity of their vessels which is admitted by this government is the acknowledged right of belligerents to enter a neutral merchant vessel in time of war to ascertain her true character, and whether she has contraband articles of war on board.

Whether the civil war which was recently prevailing in Peru, and is now happily terminated, gave to the contending parties, reciprocally, the rights of belligerents, so far as regards the other powers of the world, which you deny, is a subject into which I need not enter, as you explicitly state, that the proceeding in relation to the *Dorcas C. Yeaton* had no reference to any such pretension.

One remark, however, in relation to this branch of the subject seems called for in consequence of the allusion you have twice made in your letter to the views presented by Mr. Clay, concerning the situation of Peru at the time of the aggression complained of; views which you consider incorrect and inconsistent, and which you are pleased to characterize as "remarkable." I cannot concur with you in your censure of the position taken by Mr. Clay, but, on the contrary, consider it entirely justified by the circumstances. You object that Mr. Clay "lays down the *gravamen*, as it were, of the offence attributed to Commander Dueñas in attempting to visit a vessel of the United States on the high seas, in a time of profound peace," &c., while at the same time that minister "by his own argument declares that Peru is in a state of civil war." I do not consider the views presented by Mr. Clay justly liable to the objections you urge. Peru, so far as respects the effect of its political condition upon its intercourse with other powers, was in a state of peace. Neither of the parties contending for the government of the republic claimed any of the rights of a belligerent, connected with that intercourse, so that the foreign relations of the country were undisturbed by its internal commotions. No blockade was proclaimed, nor were foreign vessels pronounced to be neutrals, and subject to search and seizure for the reasons recognized by the laws of nations, conditions which bring with them the partial interruptions to which foreign commerce in periods of public war is exposed. On the contrary, you maintain in your letter to me that the

state of things in Peru brought with it no belligerent rights ; that in fact there was no civil war, but a rebellion merely against the lawful government. I shall not undertake to settle any general principle by which the true character of an insurrectionary movement in a country may be tested, and under what circumstances it becomes a contest for a change of the government, giving to it the attributes, together with the just consequences of a civil war. It is sufficient to say that the situation of the contending parties in Peru, and the avowed objects of the insurrectionary leaders, together with the extent of their operations, and also the extent and importance of the portion of the republic which they occupied and governed at different periods of the struggle, made that contest a civil war. And it was accompanied, so far as respects the intercourse of other powers with Peru, with all the rights which belong to that condition, and which either of the parties was disposed to claim and exercise in conformity with the recognized principles of the law of nations.

While informing me that you deem it unnecessary "to discuss or put forward the right of visitation," you remark that in a conversation you had with me, I stated "there were cases in which a national vessel might be justified in visiting a merchant vessel on the high seas, and that the government of the United States would not in such cases make a formal reclamation," and that I had put a case illustrative of this position applicable to the circumstances of the Tumbes.

I regret that my views of this subject should have been misconceived upon the occasion to which you refer. Whether the error is to be attributed to their being imperfectly expressed, or imperfectly understood, I am unable to say ; but I am sure you desire to ascribe to me precisely the opinion you supposed I entertained. But by adverting to the extracts of the letter to Lord Napier, which accompany this communication, you will perceive at once that I do not occupy the position you assign to me. I claim a total immunity for the vessels of the United States "upon the common and unappropriated parts of the ocean," to use the expression of Lord Stowell, in time of peace, under all circumstances. There is no case in which a forcible entrance into them can be justified by another power. That is, there is no case in which such entry is a lawful act. It may be an excusable one under peculiar circumstances, of entrance and of conduct, which might well induce the aggrieved party to renounce all claim for reparation ; as, for instance, if a piratical vessel were known to be cruising in certain latitudes, and a national armed ship should fall in with a vessel sailing in those regions, and answering the description given of the pirate, the visitation of a peaceable merchantman in such a case, with a view to ascertain her true character, would give no reasonable cause of offence to the nation to which she might belong, and whose flag she carried.

But if I understand correctly the position you take in behalf of your government respecting the detention of the *Dorcas C. Yeaton*, it is unnecessary for me to discuss the general question of the claim of visitation, except to express the dissent of the United States from the principles in relation to it which you have laid down. That being done, I have to observe that the question of private injury having been

removed by the action of Peru, if the entrance into the American vessel were a peaceable one, without violence or menace, the United States have no demand to make of the government of your country, either in satisfaction of the act or for the punishment of the officer by whose orders it was committed. There is conflicting testimony as to the precise circumstances which occurred, but there is no version of them which attributes any offensive character to the transaction. Assuming, therefore, that such are the views of your government, and the use of force on this occasion being denied and disavowed on its behalf, the United States have no longer any cause of complaint against the government of Peru for this detention of one of their vessels.

But while I am gratified at being able to give you this assurance, I think it proper to remark, that the circumstances of this occurrence, independent of the statement of the persons present, may well have led Mr. Clay to believe that the entrance into the American vessel was not altogether a peaceable one.

The Peruvian armed steamer was sailing upon the high seas with the purpose, as you avow, of preventing the vessels of other powers from resorting to the guano deposits. It is not denied that Peru has the right to exercise due vigilance in enforcing her revenue laws within a reasonable distance of her shores, but this should be done by a preventive service, stationed in the neighborhood of the place where a contraband trade is anticipated, and not by vessels traversing the high seas, exercising an arbitrary jurisdiction over the commerce of other powers, and exposing it to vexatious interruptions and injuries. And the measure of keeping an armed steamer upon the ocean for this purpose is liable to another objection, not less decisive as to its condemnation. The Tumbes belonged to the government, against which the revolutionary party was contending, and was acting under its orders. Those orders were to intercept by force all commercial communications with various places in the possession and under the jurisdiction of the adverse party. The United States deny the right of interference in such cases, for reasons which will be more fully developed in the observations I shall present respecting the capture of two other American vessels, the "Lizzie Thompson" and the "Georgiana." The orders and destination of the steamer necessarily led to the opinion that force was to be used in the accomplishment of the object of her cruise, and thus the statements made to the American consul upon this point were the more readily credited, and especially when taken in connexion with the arrangement, just and proper, indeed, which was made for the satisfaction of the owners. The large sum of \$9,600 voluntarily offered by the commander of the Tumbes for the short detention of a few hours of the American vessel, not unnaturally, however unjustly, may have induced the opinion that the Peruvian officer felt that he had committed a grave error, which might have serious consequences, unless atoned for by a mutually satisfactory arrangement. Had no force been used or threatened, there was no error to correct. Nor is this consideration weakened by one of the reasons given by you for the liberal offer of the Peruvian officer, that a prosecution of a voyage to the guano deposits might involve the owners of the vessel in fatal consequences.

A motive of action in the disposal of public funds to foreigners, to prevent them from engaging in what was considered an illegal traffic, scarcely reconcileable with the condition of the parties.

The capture of the *Lizzie Thompson* and of the *Georgiana*, two American vessels, furnishes another subject of complaint, and the United States confidently appeal to the justice of the government of Peru for such satisfaction as this violent and unjust seizure demands, and as is due to the amicable relations subsisting between the two countries. The facts lie within a narrow compass, and in their main features are indisputable. These vessels, whose capture and the harsh treatment of whose crews form the subject of this reclamation, were owned by American citizens, and left the United States with regular clearances; one, the *Georgiana*, for Valparaiso, in Chile, and the other, the "*Lizzie Thompson*," for Iquique, in Peru. Arrived at their ports of destination, they disposed of their respective cargoes, barley and lumber; but the *Georgiana* was required by the consignees to deliver her freight at Iquique, or at another place in Peru called Mala. When they reached Iquique the captains found a civil war raging in the country, where, indeed, it had existed for almost two years, one of the contending parties seeking to retain possession of the government, and the other to obtain it by force. This movement had been going on with varied success, and during its progress, as stated by Mr. Clay, and not disputed, the insurrectionary party got possession of some of the important ports of Peru, and, while holding them, they exercised all the functions of government, as well those relating to external as to internal concerns. Vessels were cleared, and all the necessary acts performed which were required by the operations of commercial intercourse. These ports extended almost from the southern to the northern boundary of the country. Among others thus occupied by the insurrectionists were the port of Iquique, and also two small places, Punta de Lobos and Pabellon de Pica, in its vicinity, all of which were in their possession when the two American vessels arrived at Iquique and sought employment. The custom-house was open, and the officers appertaining to it in the regular discharge of their duties, and the necessary papers for the entrance and clearance of vessels were readily granted. The revolutionary party had full possession of the government at the points indicated. The true bearing of this fact is not weakened, as you suppose, by calling the military detachments maintaining possession at the two small points "a few insurrectionary soldiers," because if they were sufficiently numerous, as they undoubtedly were, to effect the object, the number actually employed in the service becomes a question of no importance, and in a subsequent part of your note you admit that these places "were garrisoned by some forces of the insurrectionists," &c.

Under these circumstances, the usual commercial relations between Peru and the United States were continued, and the vessels of the former resorted to the ports of the latter, carrying freight and seeking employment, as before. In doing so, and while conforming to the regulations and submitting to the authorities they found established there, are they liable to seizure and condemnation and their

crews to punishment by the adverse party? The United States maintain they are not, and that no such principle has been recognized during the civil wars which have recently been so prevalent in various countries. On the contrary, commerce has been often carried on without regard to these internal contests, and the established functionaries at the various ports of entrance have exercised all necessary authority. The pretension advanced by your government, which would render all these proceedings liable to be declared void, cannot be successfully maintained. If recognized, it would expose foreign commerce to the most oppressive exactions and interruptions. It would enable either party, acquiring possession of a place, to disregard all the official acts which had been done by its opponents while occupying it, and enforce the repayment of all public charges, though previously fully satisfied, together with the forfeiture of vessels and the punishment of their crews.

Your claim for the government at Lima, during the existence of the contest, authority over the whole country, and the duty of obedience from every person residing in it, whether citizen or stranger. A similar claim is very often put forward, in cases of civil commotion, and is not seldom urged at the same time by both parties. It cannot be admitted where a civil war is raging, and that, in the opinion of this government, was the condition of Peru. A condition which conferred upon *de facto* rulers the right to govern such portions of the country as they were able to reduce to their possession. It is the duty of foreigners to avoid all interference under such circumstances, and to submit to the power which exercises jurisdiction over the places where they resort, and while thus acting they have a right to claim protection, and also to be exempted from all vexatious interruption when the ascendancy of the parties is temporarily changed by the events of the contest. Undoubtedly, the considerations you urge respecting the true character of an armed opposition to a government are entitled to much weight. There may be local insurrections, armed opposition to the laws, which carry with them none of the just consequences recognized by the law of nations, as growing out of a state of civil war. No fixed principal can be established upon this subject, because much depends upon existing circumstances. Cases, as they arise, must be determined by the facts which they present, and the avowed objects of the parties, their relative strength, the progress they respectively make, and the extent of the movement, as well as other circumstances must be taken into view. While you do not deny that there may be civil wars, carrying with them the consequences to which I have referred, you consider the contest in Peru, comparatively an unimportant movement, an insurrection indeed, entitled to no such distinction. I do not concur in this view, nor does it appear to have been always concurred in by the government you represent. Mr. Clay appeals to some of the proceedings of the government at Lima, in proof of its recognition of the character of the contest. And certainly the negotiation with the military and naval officers at Arica, belonging to the revolutionary party, by the direction of that government, and for their submission to its authority, indicates very clearly the opinions of both parties, asserted, indeed,

in the official documents that a civil war was prevailing in the country. The propositions made by the chiefs of the revolutionary party upon that occasion maintained that of "their own free and spontaneous will" they have manifested to the government commissioners "their desire to put an end to the civil war which afflicts the republic, which they might prolong with the elements they possess," and offer the terms upon which they will submit. These terms were unconditionally accepted by the commissioners and were approved and ratified by the council of ministers, and thus was the state of civil war fully recognized.

Besides your estimate of the partial nature of the movement, which, in your opinion, divests it of the true character of a civil war, if I understand your position, you consider some act of a foreign government recognizing the existence of such a war to be necessary before its citizens can claim the protection which the United States demand for their own.

I must express my dissent from this position, at least in its application to these two American vessels. I do not propose, however, to investigate the general proposition as to the necessity of this external political interference, because such a discussion is not demanded for any purpose I have in view. Cases have been put, and may be put again, which, in the opinion of high authorities, require such a measure before they carry with them the consequences attached to the condition of civil war. Such cases may relate to the declaration of a blockade, to a claim to search vessels as neutrals, and to the exercise of other belligerent powers assumed by the hostile rulers. By what public act, whether proclamation or otherwise, this recognition must take place I have not found laid down. I am not aware that, in this country, any solemn proceeding, either legislative or executive, has been adopted for the purpose of declaring the status of an insurrectionary movement abroad and whether it is entitled to the attributes of a civil war, unless, indeed, in the formal recognition of a portion of an empire seeking to establish its independence, which, in fact, does not so much admit its existence as it announces its result, at least so far as regards the nation thus proclaiming its decision. But that is the case of the admission of a new member into the family of nations. Such is not the condition of Peru. She had already attained that position, and her intestine difficulties arose out of an effort to change the administration of the government, which was a matter of purely domestic concern, not touching foreign powers, unless in the progress of the contest their interests were brought into question. So long, therefore, as such a contest preserves its domestic character there is no necessity for external interposition, unless, indeed, there be a determination to take part with, and aid one of the parties by the direct application of force or by the exertion of political influence. Such has not been the policy of the United States, and they carefully abstained from all interference with the troubles in Peru, content to abide the decision which its people might make; and this government permitted the diplomatic intercourse of the two countries to continue unchanged, as a measure demanded by their mutual interests and not as an acknowledgment of the pretensions of either of the rival parties. It

is therefore unnecessary to advert to the effect of a formal recognition by the executive, and how far that act of political power would be obligatory upon the courts of justice and binding upon the rights of individuals. Whether a civil war was prevailing in Peru is a question of fact to be judged by the proofs, as the existence of a war between two independent nations is a similar question, to be determined in the same manner where—as is often the case, at least in this country—there is no public authoritative recognition of it. Foreigners in Peru were subject to the local jurisdiction and bound to submit to it, and while so submitting they were entitled to protection and not justly liable to be called in question for such obedience upon any change of authority consequent upon the progress of military events.

You will perceive by this view that the importance you attach to the fact that the American captains could not be ignorant of the true state of things in Peru, a fact in which you find a justification for the proceedings that took place affecting them, becomes a subject of no importance whatever. Ignorant or informed of the situation of Peru, their rights and duties were precisely the same. They had a right to enter any port of the republic open to foreign commerce, and not blockaded, for the prosecution of their commercial enterprizes; and it was their duty after such entrance to obey the authorities they might find established there. And the same principle which is applicable to the jurisdiction of a *de facto* government over persons applies with equal force to questions of internal administration touching the public revenue. These are subjects which follow the possession of the powers of government. The views, therefore, which you present at some length of the laws of Peru, providing for the regulation of the trade in guano, and prescribing penalties for their violation, have no practical connexion with the case of these two American vessels. The true construction of these regulations, their repeal or suspension, or modification or application, are questions of administration to be determined by the existing administrative power, to whose decision foreigners must submit. When the revenue officers at Iquique, acting under the authority of the *de facto* government, gave the necessary permission for the purchase of guano at the places indicated, then subject to the authority of that government, the American captains had the right to repair thither, and to take that article on board their vessels for freight, in conformity with the provisions of their charter parties. And the transfer of the possession of these places while the vessels were engaged in this employment, could justly work no forfeiture for acts previously done under these circumstances, nor subject the officers or crew to punishment. The United States recognize no pretension for such interference, but hold on to the stipulations of their treaty with Peru, which guarantees protection to their citizens without regard to whatever changes, violent or peaceable, may take place in the government of that country.

Connected with this branch of the subject, you inquire how it happens “if possession *de facto* be the criterion of jurisdiction for the enforcement of fiscal or custom-house laws, (for all authority you might have added,) that the possession affirmed and realized *de facto* through the capture by the ‘Tumbes’ of the vessels in question failed to be

considered in point of law as a just and lawful ground for the seizure that was made?"

This question admits of a satisfactory answer and a brief one. While contending parties are carrying on a civil war, those portions of the country in the possession of either of them become subject to its jurisdiction, and persons residing there owe to it temporary obedience. But when such possession is changed by the events of the war, and the other party expel its opponents, the occupation it acquires carries with it legitimate authority, and the right to assume and exercise the functions of the government. But it carries with it no right, so far at any rate as foreigners are concerned, to give a retroactive effect to its measures, and expose them to penalties and punishments, and their property to forfeiture for acts which were lawful and approved by the existing government when done. If the government at Lima had taken forcible possession of the places where the two American vessels were at anchor, and had established its authority, it would then have been entitled to demand that such authority should be recognized and obeyed, and to enforce it, if necessary, so far as might regard all transactions occurring during such occupation without, however, affecting existing rights. The principle is clear, but it does not appear that the circumstances called for its application. No possession of any portion of the country in question seems to have been taken by the "Tumbes." It is admitted, indeed, that that vessel exercised no jurisdiction "on shore." She sailed into the small ports "garrisoned" by the other party, and in the absence of its two armed vessels, and made "capture" and "seizure" of the American vessels, and then, for aught that appears, abandoned the position and left the adverse jurisdiction as she found it. This is no rightful proceeding under any circumstances attending a civil war, and still less under the circumstances in which it took place.

The cutting out of these vessels resembles a piratical enterprise rather than the exertion of a legitimate power against the property of a friendly nation under the authority of an established government.

Upon a full consideration of the subject, the President indulges the confident expectation that the government of Peru, on reviewing the circumstances, will not hesitate to make such compensation for the capture of the Georgiana and of the Lizzie Thompson, and for the injuries to the captains and the crews as these violent transactions call for.

There is another incident connected with these occurrences to which I invite your attention.

Mr. Clay has complained of the conduct of the commander of the "Tumbes" for a want of humanity, in his treatment of the crews of the two captured American vessels. This charge you regard as unfounded, and the course pursued upon that occasion as just and humane. I have no disposition to continue the discussion of this point of a controversy already sufficiently extended, but the indefensible nature of the transaction, not less than justice to Mr. Clay, requires that I should make known to you the disapprobation of this government of an act of cruelty towards a number of its unprotected citizens, committed by the Peruvian officer, without any excuse under the circumstances. The crews of the vessels were in a state of utter destitution,

reduced to that condition by forcible expulsion from their own vessels, and were compelled to leave in open boats, badly equipped for the purpose, and without provisions or water, and some forty or fifty miles, as Mr. Clay states, from any place where these indispensable articles could be procured. I am sure the enlightened government of Peru would condemn the conduct of the captain of the *Tumbes* were all the facts of the case correctly before it. In a declared war, persons thus captured in the prosecution of hostilities would rarely be subjected to such treatment, and never without the serious responsibility of the government permitting or justifying the measure. But these unfortunate men were the citizens of a friendly republic, engaged in peaceable commerce, and had done no act justly exposing them to capture or to punishment. The United States have a right to expect the government of Peru will mark with its displeasure the conduct of its officer upon that occasion.

I have requested from the Attorney General his opinion upon some of the questions involved in the discussion between our respective governments, and I enclose, for your information, a copy of the communication I have received from that officer in answer to my application. His views meet the concurrence of the President.

I avail myself of this occasion, sir, to offer to you a renewed assurance of my very distinguished consideration.

LEWIS CASS.

Mr. Black to Mr. Cass.

ATTORNEY GENERAL'S OFFICE,
May 15, 1858.

SIR: The questions you have submitted relative to the seizure of the American vessels "*Georgiana*" and "*Lizzie Thompson*" by the Peruvian war steamer "*Tumbes*," on the coast of that country, have had my consideration.

The two American vessels were engaged in lawful trade without any intention on the part of masters, owners, or other persons, to do injury to the Peruvian government, or to violate any law which they might find to be in force for the regulation of commerce in that part of the world. They both went into the port of Iquique, and there, after discharging the cargoes with which they were laden, they procured a regular clearance and license at the custom-house to load with guano at certain points on the coast where that article is found. While they were engaged in taking in their cargoes of guano, agreeably to the license so obtained, they were forcibly seized by the Peruvian steamer, the persons on board were imprisoned, and the vessels carried into Callao, under a charge of being engaged in contraband trade.

Neither the commander of the "*Tumbes*" nor the government which he served has attempted to vindicate the justice or legality of these pro-

ceedings on the ground that the clearance and license under which the Americans acted were unlawful in form or substance. It is not pretended that the authority given on the face of the license was insufficient to cover the acts of the persons who had it. The whole objection to the papers is founded on the fact that the acting governor of Iquique, and the collector, who was in possession of the custom-house, held their offices, not under the authority of the supreme government of Peru, but by appointment from Vivanco, a revolutionary chief, who had taken arms against it. But at the date of the license, this so called revolutionary party had full possession of this port of Iquique, of the guano deposits, and of the whole country southward to the Bolivian line. When the Americans went there they found a government organized, and its officers performing the functions which pertained to the execution of the local laws. If there was any other power in existence strong enough to dictate the law at Iquique it was not exercised, nor did the foreigners at Iquique receive even a notice that it would ever be exercised in the future. Under these circumstances, could the Peruvian government justly or lawfully treat the American vessels as violators of their law?

When a portion of the territory of one nation is taken possession of by the forces of another with which it is at war, the conquering party has an undoubted right to declare the law of the place as long as his occupation of it continues, and all the rights of the previous sovereign are suspended until his possession is resumed. The island of Santa Cruz, then recently captured by the British forces, was in their temporary occupation during our last war with that country. We held it to be a colony of our enemy, and for that reason our courts declared that a cargo of sugar shipped from there was the lawful prize of an American privateer who had captured it.—(9 Cranch, 191.) We conceded the same rule when it operated against us. The port of Castine was taken by the British in 1814, and it was decided that our revenue laws did not apply to it any more than to a foreign country.—(4 Wheat. 246; Gullison's Rep., 501.) Indeed, nothing can be clearer than that the conquest of a country, or portion of a country, by a public enemy entitles such enemy to the sovereignty and gives him civil dominion as long as he retains his military possession. The inhabitants who remain and submit, and strangers who go there during the occupation of the enemy, must take the law from him as the ruler *de facto*, and not from the government *de jure*, which has been expelled. It is equally well settled that, when the former government resumes its possession of the territory, whether by force or under a treaty, it cannot call the citizens or subjects of a third nation to account for obeying the authority which was temporarily supreme, during the enemy's occupation of the place. The *jus post liminii* has no sort of application to such a case.

It may be supposed that these principles refer only to a lawful war carried on between two separate and independent nations. But we shall see, I think, upon further examination, that they apply with equal force to a conflict like that in which Peru has been engaged.

When the people of a republic are divided into two hostile parties, who take up arms and oppose one another by military force, this is

civil war. The fact that civil war exists does not depend in the least on the cause of the dispute. No foreign nation has a right to interfere between the parties, nor to judge the merits of the quarrel, unless with the purpose of making war upon one or the other. They have appealed to the sword and the sword must decide it; other powers are bound to observe a strict and impartial neutrality. If the party which opposes the previously established government shall succeed in overthrowing it entirely, and gets possession of the whole country, nobody can be perverse enough to deny that in such a case the new government is sovereign and authorized to dictate the law which shall prevail. Supposing, however, that the rebellion is but partially successful and the old government maintains itself in one part of its territory, whilst it is obliged to surrender another, shall it then give law where it has no power to enforce obedience, or shall its authority be confined to the territory which it occupies? The answer to this question is not doubtful; a revolutionary party, like a foreign belligerent power, is supreme over the country it conquers, as far and as long as its arms can carry and maintain it.

Vattel (Book III, ch. 18, sec. 295) says, what all writers on the subject assent to, that the two parties to a civil war are to be regarded, for the time, as distinct political societies, and stand in the same predicament as two belligerent nations. They are entitled, one as much as the other, to the respect of foreigners who deal with them, or meet them on sea or land. They can each of them claim the same rights of asylum, hospitality, and intercourse with other nations.—(3 Wheaton, 643.) The captures made by both give titles to the prizes which their respective ships lawfully commissioned may take.—(7 Wheaton, 337.) Each of them is deemed by us to be a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights.—(Ib.) These rules of public law are recognized and enforced by our neutrality laws and those of England. It is a crime for our citizens to take part on either side of a civil war, as much as it is to aid one nation in fighting another. All the nations of the earth have acknowledged this doctrine. It was never denied during our revolutionary war with Great Britain, nor during the civil contest between Spain and her American colonies. The Peruvian government itself sprang from a revolution, and while that revolution was in progress its chiefs and people would not have listened for a moment to any proposition which would give their military operations less validity or respect than those of other nations, however legitimately constituted.

The existence of civil war in Peru is admitted by the present government of that country. The fact is known to the whole world and cannot be denied. The American vessels did nothing to compromise their own neutrality or that of the flag under which they sailed. Keeping themselves within the limits of a trade lawful and fair in its character, they had a right to be protected when they obeyed the regulations which they found established and in force at the place. To give them this right it was not necessary that the government of their own country should have previously known and recognized the existence of the civil war. I am not required, for any purpose of this

case, to say how far a revolutionary party can carry on a war upon the ocean, and vex the commerce of the world upon its common highway. It has been doubted whether a mere body of rebellious men can thrust itself among the family of nations, and claim all the rights of a separate power on the high seas, without some sort of recognition from foreign governments. But there is no authority even for a doubt about the right of the parties to a civil war to conduct it with all the incidents of lawful war, within the territory to which they both belong.

On the whole case, then, my opinion is that the following propositions cannot be controverted with any show of reason or authority.

1. At the time when the "Georgiana" and "Lizzie Thompson" went to Iquique a state of civil war existed in Peru.

2. At that time, one of the parties to that civil war, having expelled the other, had possession by conquest of the port of Iquique and the points where the guano was deposited.

3. Being so in possession, and having officered and organized the local government of the port and the city and the guano deposits, the jurisdiction of the party headed by Vivanco was perfect, and an American vessel trading to the port was bound to conform to its decrees.

4. The "Georgiana" and "Lizzie Thompson" having obeyed the laws of the place then established, and having acted in pursuance of licenses given by the officers in authority, were guilty of nothing for which the other party to the civil war could punish or molest them afterwards.

5. The laws and jurisdiction of the Peruvian government were suspended at Iquique during the time that place was in possession of its domestic enemy, and its resumption of possession gave it no power to punish American citizens for a supposed violation of its laws while they were suspended; nor to make any new law which would have a retroactive effect.

6. The whole proceeding of the Peruvian government against the two vessels named was contrary to the law of nations and repugnant to the principles of natural justice.

I am, very respectfully, yours, &c.,

J. S. BLACK.

Hon. LEWIS CASS,
Secretary of State.



